the United States, and being wholly owned by a citizen or citizens thereof.*

Ships or vessels not brought within these provisions of the acts of Congress, and not entitled to the benefits and privileges thereunto belonging, are of no more value as American vessels than the wood and iron out of which they are constructed. Their substantial if not entire value consists in their right to the character of national vessels, and to have the protection of the national flag floating at their mast's head.

Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the Constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing therein. The judicial mind seems to have generally taken this direction.†

DECREE REVERSED, and a

DECREE ENTERED FOR THE APPELLANT.

THE NICHOLS.

1. Sailing ships are "meeting end on," within the meaning of the eleventh article of the act of Congress of April 29, 1864, fixing "Rules and Regulations for Preventing Collisions on the Water," when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins; a condition which always depends, to a certain extent, upon the state of the navigation, and the circumstances of the occasion.
2. The expression, "meeting *nearly* end on," in the same article, includes cases where two sailing ships are approaching from nearly opposite di-

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* 1 Stat. at Large, § 2, 288.

† The Martha Washington, 25 Law Reporter, 22; Fontaine *v.* Beers, 19 Alabama, 722; Mitchell *v.* Steelman, 8 California, 363; Shaw *v.* McCandless, 36 Mississippi, 296.

Statement of the case.

rections, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision; but the application of the rule must be considered as subject to the same limitations and qualifications as is the phrase "meeting end on," in the same article.

3. Accordingly, two sailing vessels pursuing, in the night time, lines which, if followed, it was probable, would bring them into collision, were considered, when but two or three miles apart, as "meeting end on, or nearly end on, so as to involve risk of collision" within the meaning of the eleventh article above referred to, their rate of speed having been, at the time, six miles an hour each, and their rate of approximation, therefore, a mile in each five minutes. *Held*, consequently, that the helms of *both* vessels ought to have been put to port, as provided for in such contingencies by the said article, so that each might have passed on the port side of the other. And a vessel which, in such circumstances, put her helm a starboard, and was run down and sunk by the other vessel, was held to have no claim on her for damages.
4. Mistakes committed in moments of impending peril, by a vessel, in order to avoid a catastrophe made imminent by the mismanagement of those in charge of another vessel, do not give the latter, if sunk and lost, a claim on the former for any damages.

BROWN, owning a schooner of that name, filed a libel in the District Court for Northern New York, against the barque Nichols; the ground of his complaint being, that the two vessels being on Lake Erie, one going in one direction, and the other coming towards it in another nearly opposite, and the two so approaching each other, the barque had, in violation of the "Rules and Regulations for Preventing Collisions on the Water," fixed by the act of Congress of April 29, 1864,* run into his schooner, and sunk her and her cargo. The Phœnix Insurance Company, which had insured the cargo, and paid for the loss, filed a similar libel.

The case was thus:

Congress, by the act above referred to, laid down certain rules or articles, to prevent collisions on the water, and among them these:

"Article 11. If two sailing ships are *meeting* end on, or nearly end on, *so as to involve risk of collision*, the helms of both shall be put to port, so that each may pass on the port side of the other.

* 13 Stat. at Large, 60.

Statement of the case.

"Article 12. When two sailing ships are *crossing, so as to involve risk of collision*, then, if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, *except in the case in which the ship with the wind on the port side is close-hauled and the other ship free, in which case the latter ship shall keep out of the way.* But if they have the wind on the same side, *or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward.*

"Article 18. Where, by the above rules, one of two ships is to keep out of the way, *the other shall keep her course.*"

With these articles in force, the schooner was bound up Lake Erie, of a clear, starlight night; her course west by north. The barque was bound down it; her course east by south, half south—the two vessels being nearly dead ahead of each other. The wind was from the northeast, and the speed of each vessel full six miles an hour; the two so approaching one another at the rate of a mile every five minutes. The schooner had the wind free and on her starboard side. The barque was closehauled, with the wind on her port side. Each vessel was seen from the other about the same time, and *when they were some two or three miles apart;* the evidence being conflicting as to the exact distance.

When the two vessels made each other, the mate of the barque ordered her helmsman to "keep her off a little," so as to give the schooner "a good full;" but as the vessels approached closely, he ordered him to "put the helm hard up, and keep her right off;" in other words, to port the helm. The effect of this was, of course, to turn the vessel's head southward. Such were the manœuvres of the barque.

The master of the schooner, on his part, so soon as he saw the barque's lights—judging them to be two or three miles off, "nearly dead ahead, *a very little* on our starboard bow"—ordered his helm put starboard, "to keep her off to the west." The vessels were advancing rapidly, and with the manœuvres ordered, respectively, were fast approaching each other as well. Two or three minutes before the collision—and the vessels being then not more than a quarter of a mile apart—the

master of the schooner "seeing the barque bearing down on him, and that she was off the wind," ordered the wheel of his schooner put "hard up," and to "let the main sheet run out." The schooner accordingly swung to the south, somewhat of the southwest. But this was too late, or perhaps the very cause of the catastrophe. The barque advancing, went, bow first, and at right angles, into the starboard quarter of the schooner, and the schooner went down at once.

The collision being, of course, the exact result which was liable to follow from the combined manœuvres of the vessels, the question was, which vessel had made the false navigation, under the act of Congress? And this question involved largely a consideration of the element and effects of distance; that is to say, in this particular case, the proximity of the vessels at the time when the master of the schooner gave the first order to starboard.

The District Court, not without hesitation, came to the conclusion that the distance between the vessels at this time —two or three miles—was such that the master was not in fault in making the order; that the case fell within the twelfth rule, and that the barque ought not to have changed her course. Conceding that the vessels were clearly *approaching* each other, "nearly end on," and that if they had both continued their courses, they would soon have been "*meeting* nearly end on, so as to involve risk of collision," within the meaning of the eleventh rule; that court was yet in doubt whether, at the distance at which these vessels were when they first made each other, they were "*meeting* end on, . . . so as to *involve risk of collision*," which the plain import of the eleventh rule required them to be before both were obliged to port their helms. It accordingly dismissed the libels.

On appeal, the Circuit Court was of a different opinion. The vessels being nearly dead ahead, their combined speed being twelve miles an hour, and they being thus within ten to fifteen minutes of meeting, that court considered that they were "dangerously close together," and their proximity such that the execution of the first order to starboard the helm of

the schooner, involved not only the risk of the collision, but was the controlling cause of it; and thinking that the master of the schooner had mistaken the position of the barque, and had supposed that her lights were to the windward, when, in fact, they were to the leeward, reversed the District Court's decrees.

The correctness of this reversal was the question now here, on appeals by the owner of the schooner and by the insurers of her cargo, the Phœnix Company.

Mr. Hibbard, for the appellants:

1. There is no risk of collision when vessels, upon an open lake, and in a clear night, make each other at the distance of two or three miles; nor would there have been the slightest danger of collision, in this case, had not the barque disregarded the eighteenth article, and changed her course.

The act of Congress contemplates such nearness of approach, and imminency of danger, as makes it necessary for both vessels to change; for, beyond question, the act will not be so construed as to require unnecessary manœuvres. Certainly it is not necessary that *both* should so change when they are two miles or anything like that distance apart upon an open lake.* On a narrow river the rule might be different.

If the eleventh article does not apply, it of necessity follows that the twelfth and eighteenth do, and if the barque changed her course (as it is plain that she finally did), she violated absolutely a statutory provision, and must be in fault; for if a vessel bound to keep her course, changes that course, how can a vessel bound to "keep out of her way," know where to turn to avoid her?

2. The case being to be governed by the twelfth and eighteenth articles, it follows that the barque was bound to "keep her course." The schooner was bound simply to "keep out of the way." To do this she could either port or starboard, as she pleased.

* The Ericsson, Swabey, 38; The Monticello, 17 Howard, 152.

3. As the Nichols largely changed her course, and commenced that change when the vessels were yet at a considerable distance apart, that change must make her solely responsible for all the damage done by this collision.

Mr. Ganson, contra, contended that there was not any necessity for any change of course on the part of the schooner; that she was on a course that would have taken her safely to the northward and windward of the barque; that there was nothing to prevent her pursuing that course; and that the change of her course caused the collision. Neither the eleventh nor twelfth articles applied therefore to the case, but the schooner was guilty of bringing about the collision, by attempting to pass across the bows of the barque when there was no occasion for her so doing; and in violation of the rules of navigation.

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversies growing out of collisions between ships on navigable waters are in general of easy solution in cases where the facts are agreed, or where there is no material conflict in the testimony of the witnesses. Few cases, however, find their way into the tribunals of justice where the witnesses examined in the case concur either as to which vessel was in fault, or as to the circumstances attending the collision. On the contrary, such investigations are almost always complicated and embarrassed with conflicting testimony, and sometimes to such an extent that it is exceedingly difficult to form any satisfactory conclusion upon the merits.

Some of the causes which promote such contrariety of recollection are, that the moment when the collision occurs is necessarily one of alarm, and, frequently, of consternation, and also because the disaster is seldom witnessed with much care by any persons other than those on board the respective vessels, and all experience shows that they are quite too apt to see fault in the navigation of the other vessel, more readily than in that of the vessel to which they belong. Where such conflict exists the inquiry is very perplexing,

and the difficulty can only be overcome in a satisfactory manner by a critical analysis of the testimony, and a careful comparison of the respective conflicting statements of the witnesses with the undisputed or well-established facts and circumstances developed in the testimony.

Decrees of an entirely opposite character were rendered in this case in the District and Circuit Courts, obviously on account of differences of opinion produced by the conflicting character of the testimony, and the appellants now set up a theory different from either of those adopted in the courts below, and it must be admitted that it finds some support in the evidence exhibited in the transcript.

In the investigation of such a case the first step is to ascertain the facts material to the issue involved in the pleadings, but in accomplishing that purpose, in this case, it is not deemed necessary to enter much into the details of the testimony, as any such a discussion would not benefit the parties nor any one else not possessed of the entire record. Views of the District Court were that the Nichols was in fault, but the Circuit Court was of a different opinion, and reversed the decree, and dismissed the libel. Appeal was taken by the libellant from that decree of the Circuit Court to this court. Succinctly stated, the material facts of the case, as they appear to the court, are as follows:

Heavily laden with coal and iron, the schooner William O. Brown was bound up Lake Erie, on a voyage from Buffalo to Chicago. Her course was west by north, and when the collision occurred she was about half way between Little's Point and Bar Point, and about one and a half miles from the Canada shore. Statement as to the voyage of the barque A. P. Nichols is, that she came out from Detroit River early in the evening before the collision, and that she was bound down the lake to Buffalo, laden with a full cargo of corn. Undisputed fact is that she was heading east by south, half south, and that she, as well as the schooner, had competent lookouts properly stationed on the vessel. Both vessels also showed good lights, as required by law, and they were well manned and equipped. Prior to their arrival at the place

where the collision occurred they had met with no difficulty, and they had fair weather and a good breeze from the north-east, not exceeding six or seven knots, and the speed of the respective vessels was about six miles an hour. Parties agree that the time and place of the collision is truly alleged in the libel, and there is neither fact nor circumstance in the case to warrant the conclusion that it was the result of any other cause than faulty navigation. Inexcusable as the disaster was, the principal question is, which vessel was in fault? When the vessels came together they had sufficient sea room, and they were both under full sail. The schooner had the wind free, and on her starboard side, but the barque was closehauled, with the wind on her port side. They were on lines which diverged not more than half a point, and which, in any event, if they continued their respective courses, would bring them into collision. Obliged to change their course or collide, the true inquiry is, what should have been done? Clear weight of the evidence is that each vessel was seen from the deck of the other, about the same time, when they were some two or three miles apart, and as they were approaching each other from nearly opposite directions it is quite clear, under the regulations enacted by Congress, that the helms of both should have been put to port, so that each might have passed on the port side of the other, unless the distance between them, at that precise time, was so great as not to involve risk of collision. Rules of navigation are obligatory upon vessels approaching each other, from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain.*

When the two vessels made each other it was the mate's watch on board the Nichols, and he had command of her deck. His first order to the man at the wheel was to keep her off a little, so as to give the vessel ahead a good full; but as the vessels advanced, seeing that there was danger of collision, he gave the order to put the helm "hard up and keep

* Mail Steamship Company *v.* Rumball, 21 Howard, 384; The Ericsson, Swabey, 38; Lowndes on Collision, 24.

her right off," which, under the circumstances, was equivalent to the order to port the helm, as the helmsman stands on the weather side of the wheel, and consequently the effect of the order "hard up," when executed, was to bring the helm to port, and turn the prow of the vessel to the leeward.

Before remarking further as to the movements of the barque, it becomes necessary to ascertain what was done on board the schooner, as she was approaching from nearly the opposite direction, at about the same speed. Her master admits that he saw both side lights of the other vessel at the same time, and he testifies that he immediately ordered the helm of his vessel to be put to starboard. Plain effect of that order, when executed, was to turn the prow of the vessel to the leeward, instead of hugging the wind closer, as she should have done, to avoid a collision.

Article eleven of the regulations enacted by Congress provides that if two sailing ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

Sailing ships are meeting end on within the meaning of that provision when they are approaching each other from opposite directions, or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins, which cannot be precisely defined, as it must always depend, to a certain extent, upon the state of the navigation, and the circumstances surrounding the occasion.

Where vessels approaching are yet so distant from each other, or where the lines of approach, though parallel, are so far apart as not to involve risk of collision, that rule of navigation has no application to the case.

Much greater difficulty will arise in any attempt to define, with technical accuracy, the phrase nearly end on, as the language itself is in terms somewhat indefinite. Such attempts have been made in the English Admiralty Court, but without much practical success. Nearly end on, as the

phrase is employed in that article, may doubtless be construed to include cases where two sailing ships are approaching from nearly opposite directions, or on lines of approach substantially parallel, and so near to each other as to involve risk of collision; but the application of the rule must also be considered as subject to the same limitations and qualifications as the preceding phrase in the same article. Decided cases may be found in the English admiralty reports where the attempt is made to define, with precision, how great the variation may be from opposite directions, or from parallel lines, and the case still be within the eleventh article; but the present case does not necessarily involve that inquiry, as the variation, in any view of the evidence, did not exceed half a point by the compass, which is clearly insufficient to take the case out of the operation of that article.*

Argument for the appellant is, that the distance between the two vessels was so great when the helm of the schooner was put to starboard that it cannot be considered as a fault, and such, it seems, was the opinion of the district judge; but the proposition, in view of the circumstances, cannot be sustained, as it was in the night time, and the combined speed of the two vessels was at least twelve miles an hour, and none of the witnesses pretend that more than ten or fifteen minutes elapsed after the second order of the master of the schooner was given, to put the helm hard up, before the collision took place.

Strong doubts are entertained whether the effect of the first mistake made by the schooner would have caused a collision if she had then kept her course; but the second order to put the helm hard up, was fatal as the schooner then fell off even faster than the barque, and the collision became inevitable. Particular description of the effect of that movement need not be given, except to say that it brought the schooner directly across the bows of the barque. Confirmation of this view is derived from the conceded fact, that the schooner was struck by the stem of the barque on

* Holt's Rule of the Road, 64, 70, 154.

her starboard quarter. The effect of the blow was that she sunk, and, with her cargo, became a total loss.

Remaining proposition of the appellant is, that the barque is also in fault, because her helm, just before the collision occurred, was put to starboard; but it is clear that the error, if it was one in that emergency, was produced by the impending peril, which is justly chargeable to those having the control and management of the other vessel. Mistakes committed in such moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel.

Appeal was taken to this court at the same time from the decree of the court below, in the case of *The Phœnix Insurance Company* v. *James R. Slanson*, claimant, &c., and the two cases were argued here together, as the parties conceded that they depend upon the same facts. All the testimony was taken in the first case, and the stipulation of the parties is, that it should be regarded as also taken in the other, and that both cases should be heard at the same time. Libellants in this case were insurers of the cargo, and having paid the loss to the owner, they claimed that they were subrogated to his rights and interests, and that, by reason thereof, they had a lien upon the barque for the amount which they paid to the owner of the cargo. Evidently the appeal is disposed of by the opinion in the other case.

DECREES AFFIRMED.

THE FLOYD ACCEPTANCES.

1. The government of the United States has a right to use bills of exchange in conducting its fiscal operations, as it has the right to use any other appropriate means of accomplishing its legitimate purposes.
2. When the government becomes a party to such a bill, it is bound by the same rules in determining its rights and its liabilities as individuals are.